APPENDIX A

[Rendered: July 29, 1994]

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 92-CA-3033-MR

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Appellant

v.

ASHLAND OIL, INC.,
Appellee

Appeal from Greenup Circuit Court
Honorable James W. Lyon, Sr., Judge
Action No. 91-CI-219

OPINION REVERSING AND REMANDING

* * * *

BEFORE: LESTER, Chief Judge; DYCHE and WILHOIT, Judges.

DYCHE, JUDGE. The Revenue Cabinet ["Cabinet"] appeals from an opinion and order of the Greenup Circuit Court entered November 18, 1992, which reversed a February 15, 1991, Board of Tax Appeals order upholding an assessment of use tax made by the Cabinet against Ashland Oil, Inc. The Greenup Circuit Court found that the Cabinet erred in assessing a second tax with respect to three aircraft leased by Ashland Oil upon

which a use tax had already been paid, and that the Cabinet erred in attempting to tax the entire amount of gross receipts derived from interstate commerce upon a total of seven aircraft being leased to and used by Ashland Oil in Kentucky.

The facts of the case are not in dispute. Ashland Oil, a Kentucky corporation and appellee herein, leased the seven aircraft in question from Ash Property, Inc., an Ohio corporation and subsidiary of Ashland Oil. The lease agreements, which were entered into outside Kentucky, provided for initial lease terms of five or seven years and gave Ashland Oil the option to renew each lease for additional periods of time. Appellee took delivery of the aircraft in Kansas and, pursuant to the express terms of the lease agreements, they were thereafter based at an airport in Worthington, Kentucky.

Two groups of aircraft are involved. The first group consists of three Sabreliner and Beechcraft King Aire aircraft. Ash Property purchased these planes before August 1, 1985, and then leased them, also before August 1, 1985, to appellee. These lease agreements were renewed after July 31, 1985, thereby triggering the application of KRS 139.532(2)[1] resulting in a use tax assessment.

---

[1] KRS 139.532 entitled "Applicability of sales or use tax to gross receipts from various sources" reads as follows:

(1) Gross receipts from the lease or rental of tangible personal property are exempt from sales or use tax if the receipts are:

(a) Derived from a lease or rental agreement entered into before August 1, 1985; and

(b) The sales or use tax applicable to the purchase price of the property was paid prior to August 1, 1985.

(2) Gross receipts from lease or rental agreements for tangible personal property that are renewed after July 31, 1985, and gross receipts from lease or rental agreements entered into after that date, are subject to sales or use tax.

(3) Notwithstanding the provisions of subsection (1) of this section, lease or rental agreements subject to use tax under the provisions of KRS 139.320 remain subject to tax regardless

A use tax assessment had previously been issued against Ash Property for its original purchase of these three aircraft. Ash Property contested that initial assessment on the ground that it did not use the property within the state. This Court in a non-published opinion styled *Ash Property v. Revenue Department, Commonwealth of Kentucky*, No. 87-CA-1288-S, rendered May 13, 1988, upheld the assessment reasoning that Ash Property had used the aircraft in Kentucky within the meaning of the use tax statutes, specifically KRS 139.190, by leasing them to Ashland Oil [2].

The second group of aircraft consists of four Cessna Citations. In the case of these aircraft, no Kentucky sales or use tax was paid on their original purchase prices. However, these planes' subsequent rental to Ashland Oil by Ash Property and use in Kentucky it is alleged by the Cabinet is subject to use tax under KRS 139.532(2).

On February 15, 1991, the Kentucky Board of Tax Appeals rendered a decision upholding the Cabinet's final ruling and assessment of use tax in the amount of $85,217.00.

Before the Greenup Circuit Court, Ashland Oil argued that the Cabinet's attempt to extract a second use tax for use of the first group of aircraft when the identity of neither the lessor nor the lessee of such aircraft had changed, constituted impermissible double taxation under

---

of when such lease or rental agreements were executed. (Enact. Acts 1985 [1st Ex. Sess.], ch. 6, part III, § 10, effective August 1, 1985.)

[2] KRS 139.190 entitled "Use" states:

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction in which possession is given, except that it does not include the sale of that property in the regular course of business. (Enact. Acts 1960, ch. 5, Art. I, § 19, effective February 5, 1960.)

Kentucky law. Secondly, Ashland Oil contended that the Cabinet's attempt to impose a use tax on 100 percent of the gross receipts derived from interstate commerce, specifically the interstate use of the aircraft, violated the Commerce Clause of the U.S. Constitution because the aircraft were predominantly used outside Kentucky. The Circuit Court agreed.

In its November 18, 1992, opinion, the Circuit Court found that the levy of two use taxes for the privilege of using the same aircraft where both the owner and user of the aircraft remained the same was indeed double taxation, and prohibited as such because it violated the Kentucky Constitution and the public policy against double taxation. As to the second issue, the Circuit Court found the Cabinet's attempt to apply a use tax to the entire *unapportioned* gross receipts derived from interstate commerce to be invalid on Commerce Clause grounds. (Emphasis ours.) Accordingly, the Circuit Court ordered as follows:

> This cause is reversed and remanded to the Cabinet for the sole purpose of calculating the use tax applicable to the second group of aircraft based on the statistical evidence contained in the record as to the uses and values asserted by [Ashland Oil].

Simply put, the Circuit Court ordered that the use tax assessed by the Cabinet on the proceeds derived from interstate commerce be apportioned fairly to reflect only the aircrafts' use in Kentucky. This appeal followed.

Appellant makes two convincing arguments before this Court. It first argues that the assessment of a use tax against Ash Property for the original purchase of the first group of aircraft and the assessment of a use tax against appellee for the aircrafts' subsequent lease does not actually constitute double taxation; and, further, that even if it did, such assessments were specifically contemplated and sanctioned by the Legislature in KRS 139.532 (1) and (2). Secondly, the Revenue Cabinet urges that its assessment of a use tax for appellee's lease of aircraft

used and permanently based in Kentucky does not violate the Commerce Clause; and KRS 139.510, which provides an exemption or credit for use taxes already paid to other states, preserves the constitutionality of the use tax law and validates the use tax assessment of the gross receipts derived from the leases herein.

As for appellant's first argument, the Greenup Circuit Court's conclusion that the use tax assessed upon the renewal of the leases for use of the first group of aircraft in Kentucky constituted double taxation is indeed contrary to well settled law. The assessments in question were issued to two separate and distinct taxpayers for separate and distinct privileges and as such, it is our opinion, they do not constitute double taxation. The two separate and distinct transactions are: 1) the purchase of the aircraft by Ash Property before August 1, 1985; and 2) Ashland Oil's subsequent lease of the planes after August 1, 1985. In *Second Street Properties v. Fiscal Court of Jefferson County*, Ky., 445 S.W.2d 709, 715 (1969), a taxpayer contested the imposition of both a city occupational license tax and a transient room tax. The then Court of Appeals held:

> To constitute double taxation the two taxes must be imposed on the same property by the same governing body during the same taxing period for the same taxing purpose. [Citation omitted.] The tax under consideration does not have a single one of these elements, much less all of them.

The tax assessed in *Ash Property* and the use tax assessed on the renewal of the leases of the first group of aircraft after July 31, 1985, were issued to different taxpayers and were attributable to transactions that took place during different periods of time. Accordingly, there is no double taxation problem. Furthermore, even if we were to conclude there was a double taxation problem herein, our legislature, by enactment of KRS 139.532(1) and (2), has expressly contemplated and sanctioned its imposition. *See Second Street Properties, supra* at 715,

and also *Falls City Brewing Company v. Talbott*, 265 Ky. 541, ——, 97 S.W.2d 57, 59 (1936).

Appellant's second contention of error concerns the Greenup Circuit Court's conclusion that the Cabinet's assessment of a use tax upon the entire amount of gross receipts derived from interstate commerce, specifically the lease and use of the seven aircraft in Kentucky, is invalid on Commerce Clause grounds. Appellant argues that the proration formula or approach advocated by the Circuit Court, whereby the lease and use of the aircraft by Ashland Oil would only be assessed a use tax in an amount that reflects the aircrafts' in-state use, is not authorized by any statutory authority and is, in fact, contrary to the use tax statutes; further, it is argued that the approach adopted by the Circuit Court would be immensely impractical to administer. Finally, appellant contends that Kentucky affords a credit or exemption for use tax paid on a lease to another state, thereby preventing the multiple taxation condemned by the Commerce Clause. Simply stated, we agree with the Board of Tax Appeals that the assessment of the use tax by the Cabinet is constitutionally valid and thereby reject the Circuit Court's analysis to the contrary.

Kentucky's use tax is imposed pursuant to KRS 139.310 which provides:

> An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased . . . for storage, use or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

The amendment enacted by the Legislature effective August 1, 1985, expanded the definition of "purchase" contained in KRS 139.090 to include "lease or rental." As a result, the use tax is now levied on gross rentals paid for tangible personal property rented or leased from an out of state lessor for use within Kentucky.

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), the U. S. Supreme Court enunciated the test a

tax must pass to withstand an attack on Commerce Clause grounds. The tax must: (1) not discriminate against interstate commerce; (2) be applied to an activity or activities with a substantial nexus with the taxing state; (3) be fairly apportioned; and (4) be fairly related to services provided by the state. The central purpose of the apportionment prong is to "ensure that each state taxes only its fair share of an interstate transaction." *See Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989).

Here, the Circuit Court concluded that the use tax assessed was not fairly apportioned in accordance with *Complete Auto Transit*, given the substantial use of the aircraft outside Kentucky. We reject that conclusion. There is nothing in the record to suggest that any other state has in fact taxed the leases at issue here or the use, storage or other consumption of the aircraft that are the subject of these leases. There is also nothing in the record to lead us to believe that any other state would *now* have the requisite substantial nexus necessary to impose a tax. (Emphasis ours.) In short, there has been no showing of the risk of multiple taxation that this prong of the *Complete Auto Transit* test was designed to prevent. If there were, appellee would then be entitled to a credit or exemption pursuant to KRS 139.510 [3] as it is applied by the Cabinet.

Therefore, the opinion and order of the Greenup Circuit Court is reversed and this matter is remanded thereto for reinstatement of the decision of the Kentucky Board of Tax Appeals.

ALL CONCUR.

---

[3] KRS 139.510 states in pertinent part:

The tax levied by KRS 139.310 shall not apply to the storage, use or other consumption of tangible personal property in this state upon which a tax substantially identical to the tax levied under KRS 139.200 . . . equal to or greater than the amount of tax imposed by KRS 139.310 has been paid in another state....

APPENDIX B

SUPREME COURT OF KENTUCKY

94-SC-665-D
(92-CA-3033)

ASHLAND OIL, INC.,
Movant

v.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Respondent

Greenup Circuit Court
No. 91-CI-219

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED January 11, 1995.

/s/ Robert F. Stephens
Chief Justice

APPENDIX C

[Entered Nov. 18, 1992]

COMMONWEALTH OF KENTUCKY
GREENUP CIRCUIT COURT

Civil Action No. 91-CI-00219

ASHLAND OIL, INC.,
Appellant

VS.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Appellee

OPINION AND ORDER

This case is an appeal from an order of the Kentucky Board of Tax Appeals finding the Appellant liable for Kentucky use tax on certain aircraft which it leases from an Ohio corporation.

The facts are not in dispute. Two groups of aircraft are involved. The first group consists of aircraft upon which the use tax has been paid under the pre-August 1, 1985 law. The second group consists of aircraft acquired after the new law became effective August 1, 1985. The August 1, 1985 amendment subjected leases and rentals to the sales and use tax law for the first time, and the first group has now been assessed use tax a second time under this law.

With respect to the second group of aircraft, they were all purchased by the lessor outside the Commonwealth of Kentucky, and delivery was taken in Wichita, Kansas. The leases were entered into outside Kentucky and were

in effect at the time possession was first taken by the Appellant. The aircraft were first used in Kansas when they were flown by the Appellant's pilots in training sessions. Although the aircraft were subsequently hangared at a public airport in Greenup County, the aircraft were actually flown more than eighty percent of the time outside the Commonwealth.

Use tax was paid on the purchase price under the old law on the first group of aircraft, and the Cabinet now seeks to impose use tax on the lease payments made by the Appellant since the law was changed August 1, 1985 on these same aircraft. Appellant contends that the assessment of a second use tax on the first group of aircraft constitutes double taxation and is, therefore, void under Kentucky law. The Cabinet also asserts that use tax is due on the entire amount of the lease payments, while the Appellant contends that it is liable only for use tax on the lease payments attributable to use of the aircraft in Kentucky, and that the assessment of an unapportioned tax on gross receipts derived from interstate commerce, i.e., the lease payments, is invalid under the commerce clause of the federal constitution. The Appellant further contends that the use tax or leases and rentals need not be interpreted to require taxation of the entire gross receipts from the use of the property interstate, as urged by the Cabinet, and that it should apply the statute as urged by the Appellant in order to preserve the constitutionality of the use tax.

The Court finds for the Appellant on both issues.

Conclusions of Law

The Board erred in finding that the assessment of the second use tax on the first group of aircraft did not constitute double taxation and was therefore valid under Kentucky law. It is undisputed that a use tax was paid under the pre-August 1, 1985 law for the privilege of using these aircraft in the Commonwealth of Kentucky.

It is also undisputed that the Cabinet now seeeks an additional use tax for the privilege of using these same aircraft in the Commonwealth. Neither the ownership nor the lessee of the plans has changed since the original tax was assessed and paid. The Court is constrained to find that the extraction of a second tax for the privilege of using certain aircraft in this state where both the owner and user of the aircraft remain the same is indeed double taxation; to find otherwise would be to ignore reality.

It is settled law in Kentucky, amply demonstrated by the cases cited by the Appellant,[1] that double taxation is violative of the Kentucky Constitution as lacking uniformity and that such taxes are invalid on the additional grounds that double taxation is against public policy in this state. The assessment of the second use tax must therefore fall.

The Board also erred in upholding the use tax on the entire gross receipts derived from interstate commerce, i.e., the interstate use of the aircraft in question. After first citing *Complete Auto Transit v. Brady*[2] and listing the four tests which a tax must pass in order to withstand attack under the Commerce Clause of the United States Constitution, the third prong of which is that the tax must be fairly apportioned, the Board holds that the tax in question indeed passes muster. The Court finds this conclusion by the Board remarkable in view of the undisputed evidence in the record that there was *no apportionment whatsoever* with respect to the gross receipts derived from interstate commerce; on the contrary, the use tax has been assessed by the Cabinet on the entire proceeds derived from the leases. It is black letter law

---

[1] *Cumberland Telephone & Telegraph Co. v. Hopkins*, 90 S.W. 594 (1906); *City of Louisville v. Aetna Fire Ins. Co.*, 143 S.W.2d 1074 (1940); *Kentucky Power Co. v. Revenue Cabinet*, 705 S.W.2d 90 (1986).

[2] *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977).

that an unapportioned tax on gross receipts derived from interstate commerce cannot stand. See, e.g., *Complete Auto*, supra, cited by the Board as authority for its holding, and other cases too numerous to mention. Insofar as the Court can determine, none of the cases cited by the Cabinet and the Board involve the taxation of interstate gross receipts and they are therefore not in point.

It should also be noted that, while the Board rested its order in part on the lack of a showing of taxes paid other states, no such showing is necessary. The law, as applied to this taxpayer, lacks both internal and external consistency and is therefore invalid without further ado. See *Armco v. Hardesty*.[3]

The Court therefore declares the use tax applied to the second group of aircraft to be invalid as applied to the Appellant. The Court further finds, however, that the statute in question need not be interpreted in the manner urged by the Cabinet. If the statute is interpreted as urged by the Appellant and the tax computed consistently therewith, no violence is done to the commerce clause and the statute is saved. Such an interpretation results in the very apportionment which is lacking in and fatal to the Cabinet's construction of the use tax statute. It being the policy in this Commonwealth to interpret statutes in a manner which preserves, rather than destroys, their constitutional validity, it is so ordered.

There is ample evidence in the record regarding the extent of both the flight time and the ground time of the aircraft in this state, as well as the respective values to the Appellant of such times. The Court finds this evidence to be persuasive and, in the absence of evidence to the contrary, conclusive as to such values absent errors in calculation.

---

[3] *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620 (1984).

ORDER

This cause is reversed and remanded to the Cabinet for the sole purpose of calculating the use tax applicable to the second group of aircraft based on the statistical evidence contained in the record as to the uses and values asserted by the Appellant. The Court further directs the Appellant to permit Cabinet representatives to review its aircraft log books, related work papers, and calculations if it so desires, in order to determine the accuracy of the statistical evidence presented by the Appellant, which shall be conclusive absent demonstrable arithmetic or clerical error, in which case appropriate corrections shall be made.

Date Nov. 18, 1992

/s/ James W. Lyon, Sr.
JAMES W. LYON, SR.
Judge
Greenup Circuit Court

APPENDIX D

KENTUCKY BOARD OF TAX APPEALS

File No. K89-R-1081

ASHLAND OIL, INC.,
Appellant

VS.

REVENUE CABINET, COMMONWEALTH OF KENTUCKY,
Appellee

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER NO. K-13797

This cause coming on for hearing before the Board, and the Board having considered the evidence in the record, including the briefs filed on behalf of the parties, now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is a use tax case. The statute imposing the tax is KRS 139.310. Ashland Oil, Inc. appeals from the Revenue Cabinet's August 24, 1989 final ruling that upheld a use tax assessment of $154,007.00 (plus interest) for the audit period August 1, 1985 through September 30, 1986. The assessment was attributable to Ashland Oil's leases or rentals of airplanes, computer equipment and office equipment. (By amendments effective August 1, 1985 to KRS 139.090 and 139.120, the sales and use tax was extended to bona fide leases, rentals and other transfers of possession of tangible personal property that were not in lieu of transfers of title, exchanges or barters. 1985 Ky. Acts, Ch. 6 (Part III) §§ 6 and 7. See also 103 KAR 28:051).

2. A hearing was held in this case on August 15, 1990. Testimony was presented and exhibits admitted into evidence on behalf of both parties. At this hearing, it was disclosed that the amount of tax in controversy had been reduced to $85,217.00 This reduction represented the tax attributable to leases (of the computer and office equipment and one airplane) that had been entered into before August 1, 1985. See KRS 139.532(1).

3. The remaining portion of the tax assessment (which is still at issue) represents the application of use tax to the amounts paid by Ashland Oil under leases of aircraft that were renewals or amended versions of leases originally entered into before August 1, 1985. The renewals or amended versions were entered into after August 1, 1985 and during the audit period. See KRS 139.532(2). A renewed or amended lease on one of the eight planes originally involved in this tax appeal was not entered into until after the audit period. Thus, during the audit period, its use, storage or other consumption was governed by a lease entered into before August 1, 1985. Accordingly, the tax assessment was reduced pursuant to KRS 139.532(1).

4. All seven aircraft whose rentals remain the subject of this appeal were leased by Ashland Oil from Ash Property, Inc., a subsidiary of Ashland Oil. These leases or rentals were governed by agreements admitted in evidence as Appellee's Ex. 1 and are hereby incorporated in these findings by reference. Ashland Oil received possession of these planes under these leases in Kansas or at some other point outside Kentucky. The aircraft were thereafter permanently based in Worthington, Kentucky. A common provision (¶ 5) of the applicable leases contained the following (or very similar) language:

> 5. DELIVERY: Lessor shall deliver possession of the Aircraft to the Lessee, at St. Louis, Missouri on August 11, 1980. The Aircraft shall be perma-

> nently based at Ashland-Boyd County Airport, Kentucky, and such permanent base location shall not be changed without the prior written consent of the Lessor and any holder of a mortgage or other security interest on said Aircraft. At the termination of this Lease, Lessee shall redeliver possession of the Aircraft at Ashland-Boyd County Airport, Kentucky or at such other location as may be mutually agreeable to the parties.

Under the terms of these lesses, the rental payments made by Ashland were fixed sums payable yearly or monthly.

5. For purposes of the issues raised by Ashland Oil, the seven aircraft can and should be broken down into two groups. The first group consists of three Sabreliner and Beechcraft King Aire aircraft. These airplanes were purchased by Ash Property and then leased or rented to Ashland Oil. The initial lease agreements were entered into before August 1, 1985 and, as we have already seen above, renewals or amended versions of these initial leases were entered into after August 1, 1985. (Again, as we have seen, Ashland Oil's payments under the latter leases, the renewals entered into after August 1, 1985, were the ones for which tax has been assessed here. See KRS 139.532(2)). Use tax was assessed against Ash Property for its original purchase of these three aircraft under the pre-August 1, 1985 law. KRS 139.310; 139.130. This assessment was ultimately upheld by the Court of Appeals. *Ash Property, Inc. v. Revenue Cabinet,* KY TAX REPORTER (CCH) ¶ 201-838 (Ky. Bd. Tax App., Order No. K-10868, June 14, 1985), *reversed sub nom. Revenue Cabinet v. Ash Property,* 85-CI-1143 (Franklin Cir. Ct. June 5, 1987), *affirmed sub nom. Ash Property, Inc. v. Revenue Cabinet,* 87-CA-1288-S (Ky. Ct. App., May 13, 1988). It was finally paid by Ash Property in December, 1988 under the aegis of the Kentucky Tax Amnesty Program (KRS 131.400-131.445).

6. The other group consisted of four Cessna Citation aircraft. What has already been said above equally applies to these planes—except that no sales or use tax was paid by Ash Property on the original purchase or sales prices of these aircraft.

7. No proof was offered by Ashland Oil to show or even suggest that other states' sales or use taxes (or equivalent or similar taxes) were paid or assessed for the leases at issue here or for the use, storage or other consumption of the aircraft involved in this case.

CONCLUSIONS OF LAW

1. Use tax is clearly applicable to Ashland Oil's rentals or leases of aircraft for use, storage or other consumption in this state. KRS 139.310; 139.090; 139.130; 103 KAR 28:051. The events triggering the tax's application are not limited to the actual use or flying of the aircraft—they include the planes' storage as well. Here, there can be no doubt that these aircraft were permanently based or stored in this state. The lion's share of their ground time was spent here. In addition, a significant amount of actual flight occurred in Kentucky. Finally, application of the use tax here is unquestionably contemplated and required by KRS 139.532(2).

2. Insofar as the Sabreliner and Beechcraft King Aire aircraft are concerned, no double taxation is presented by the assessment of use tax for leases or rentals that commenced after August 1, 1985, and the previous tax assessment in the *Ash Property* case that was attributable to Ash Property's initial purchase of these planes. These tax assessments were issued to two separate and distinct taxpayers for separate and distinct privileges. See, e.g., 68 AM.Jur.2d *Sales and Use Taxes* § 36; *Shanks v. Kentucky Independent Oil Co.*, 225 Ky. 303, 8 S.W.2d 383 (1928); *Falls City Brewing Co. v. Talbott*, 265 Ky. 541, 97 S.W.2d 57 (1936); *Malco Theatres, Inc. v. Revenue*

Cabinet, KY TAX REPORTER (CCH) ¶ 202-088 (Ky. Bd. Tax App., Order No. K-12899, July 21, 1989); *Boise Bowling Center v. State,* 93 Idaho 367, 461 P.2d 262 (1969); *Waterbury Motor Lease v. Tax Commissioner,* 174 Conn. 51, 381 A.2d 552 (1977).

In any event, if double taxation can be said to exist here, it is expressly contemplated and sanctioned by KRS 139.532(1) and (2). *Second Street Properties v. Fiscal Court of Jefferson County,* Ky., 445 S.W.2d 709, 715 (1969).

3. Ashland Oil also raises a number of constitutional challenges to the assessment of tax at issue here. Although it invokes a number of constitutional provisions, its attack is in essence grounded in the United States Constitution's commerce clause. To withstand attack under this provision, a tax must

1) not discriminate against interstate commerce;

2) be applied to an activity or activities with a substantial nexus with the taxing state;

3) be fairly apportioned; and

4) be fairly related to services provided by the state.

Complete Auto Transit v. Brady, 430 U.S. 274, 288, 97 S.Ct. 1078, 51 L.Ed.2d 326 (1977). The foregoing test has been applied in a number of recent cases (one recently decided by the Board) involving essentially the same or similar statutory schemes and essentially the same or similar factual situations. *H.A.C., Inc. v. Revenue Cabinet,* KY TAX REPORTER (CCH) ¶ 201-901 (Ky. Bd. Tax App., Order No. K-11301, December 17, 1986); *Great American Airways v. Nevada State Tax Commission,* 705 P.2d 654 (Nev. 1985); *Archer Daniels Midland Co. v. Department of Revenue,* 170 Ill.App.3d 1014, 120 Ill. Dec. 828, 524 N.E.2d 1010 (1988); *Whitcomb v. Commissioner of Taxes,* 144 Vt. 466, 479 A.2d 164

(1984); *H.K. Porter Co. v. Commonwealth*, 11 Pa. Commonwealth Ct. 463, 534 A.2d 169 (Pa. Commw. Ct. 1987); *Director of Revenue v. Superior Aircraft Leasing Co.*, 734 S.W.2d 504 (Mo. 1987). We conclude, like we have before in the *H.A.C.* case and like the courts in the cases just cited, that the assessment of tax at issue is constitutionally valid. Accordingly, Ashland Oil's constitutional attack is rejected.

ORDER

In light of the findings of fact and conclusions of law rendered above, the Revenue Cabinet's final ruling is AFFIRMED and its assessment of use tax is upheld.

This 15th day of February, 1991.

FULL BOARD CONCURRING.

/s/ Victoria C. Coleman
VICTORIA C. COLEMAN
Executive Director